84-1655

No. ———

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

MARY P. LAFFEY, *et al.*,
Petitioners,

v.

NORTHWEST AIRLINES, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

DANIEL A. REZNECK
TIMOTHY J. LINDON
ARNOLD & PORTER
1200 New Hampshire Ave., N.W.
Washington, D.C. 20036
(202) 872-6700

MICHAEL H. GOTTESMAN
(Counsel of Record)
ROBERT M. WEINBERG
JULIA PENNY CLARK
BREDHOFF & KAISER
1000 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 833-9340
Counsel for Petitioners

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QUESTIONS PRESENTED FOR REVIEW

1. Whether, in computing a fee award under the civil rights statutes, when a district court finds that the rates plaintiffs' attorneys regularly charge their fee-paying clients do not reflect the skill, experience and reputation of the attorneys but rather the nature of the non-profit clientele they have chosen to represent, the court must nevertheless award fees based on those rates rather than on the prevailing market rates in the community for lawyers of comparable skill, experience and reputation.

2. If the answer to Question 1 is yes, whether, under the civil rights statutes, a district court may award an upward adjustment in the lodestar for superior quality of performance when the lodestar rates reflect the lower rates paid by plaintiffs' attorneys' regular non-profit clientele but the attorneys' actual performance in the case before the court is found to be at a level which would command higher rates in the prevailing market in the community.

3. Whether the civil rights statutes preclude a district court from awarding an upward adjustment to the lodestar for contingency, where the lodestar rates have been determined by reference to hourly rates for non-contingent work, and where plaintiffs' attorneys devoted many thousands of hours to the case with a 50% risk that plaintiffs would not prevail and thus that the attorneys would go uncompensated.

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MARY P. LAFFEY, *et al.*,
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NORTHWEST AIRLINES, INC.,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners[1] pray that this Court issue a writ of certiorari to review the decision of the United States Court

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[1] Petitioners are the original 40 plaintiffs in this action, who were certified as the class representatives for the class of all female cabin attendants employed by Northwest Airlines, Inc. during the pertinent time period. In addition to Mary P. Laffey, the petitioners are: M. Louise Ayres, Diane B. Backovich, Nancy J. Bates, Goldie K. Chun, Rhea Dow, Beverly A. Emge, Susan F. Gerde, Mary Patricia Gleeson, Dona M. Hall, Viona S. Hamilton, Peggy M. Helme, Judie Jochimsen, Celestine Johnson, Katherine T. Keane, Suzanne P. Kress, Margaret J. Laffey, Abby Lanman, Shirley Linburgh, Barbara E. Manrow, Alice C. McCabe, Patricia McFarland, Mary C. Moxness, Myrna Lee Olson, Janet M. Pegg, Susan M. Pupera, Carol Raschke, Angelica H. Renner, Virginia Rose, Marygale Rosenberg, Rosemary M. Ruff, Mary Ann Schaak, Georgia Simpson, Alta Mae Smith, Iris Lynn Smith, Janet P. Smith, Jimene K. Smith, Elizabeth Stewart, Gayle Sturgis, and Connie Walker.

of Appeals for the District of Columbia Circuit in *Laffey v. Northwest Airlines, Inc.*, 746 F.2d 4.

OPINIONS BELOW

The opinion of the United States District Court for the District of Columbia is reported at 572 F. Supp. 354, and is reprinted in the Appendix to this Petition at App. 76a-141a. The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 746 F.2d 4, and is reprinted in the Appendix at App. 1a-73a.

JURISDICTION

Petitioners seek review of a judgment of the United States Court of Appeals for the District of Columbia Circuit entered on September 28, 1984. A timely petition for rehearing was denied on November 21, 1984 (see App. 74a). On February 14, 1985, the Chief Justice signed an order extending the time for filing a petition for a writ of certiorari to and including April 20, 1985 (see App. 143a). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 706(k) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k), provides in pertinent part:

> In any action or proceeding under this title the court, in its discretion, may allow the prevailing party, other than the [Equal Employment Opportunity] Commission or the United States, a reasonable attorney's fee as part of the costs . . . .

The Equal Pay Act of 1963, incorporated into the Fair Labor Standards Act as Section 6(d), 29 U.S.C. § 206(d), provides in pertinent part:

> (3) For purposes of administration and enforcement, any amounts owing to any employee which have been

withheld in violation of this subsection shall be deemed to be unpaid minimum wages or unpaid overtime compensation under this Act.

Section 16(b) of the Fair Labor Standards Act, 29 U.S.C. § 216(b), provides in pertinent part:

> Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages . . . . An action to recover the liability prescribed . . . may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. . . . The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of this action.

STATEMENT OF THE CASE

The instant petition involves the calculation of attorneys' fees for the services of plaintiffs' counsel in successfully prosecuting this massive civil rights class action. Suit was filed in 1970, and the merits were finally resolved 15 years later, with this Court's denial of certiorari, on January 14, 1985, in *Northwest Airlines, Inc. v. Mary P. Laffey, et al.*, No. 84-825.

The suit was brought under Title VII and the Equal Pay Act on behalf of more than 3,300 female cabin attendants employed by Northwest Airlines, Inc. (hereinafter "Northwest"). The complaint asserted ten class-wide violations of Title VII, and four of the Equal Pay Act, collectively challenging (in the district court's words) "virtually every aspect of Defendant's employment practices" (App. 117a). After fifteen years—encompassing, *inter alia*, a lengthy trial, massive remedial

proceedings, three appeals to the court of appeals, and two efforts by Northwest to secure review by this Court —litigation of the merits culminated in a judgment described by the district court as follows (App. 85a):

> Plaintiffs prevailed on every one of fourteen claims of violation and, although not every remedy they sought was awarded, they prevailed on the vast majority of remedial issues and obtained some of the most comprehensive monetary and injunctive relief ever awarded in an employment discrimination case.

The monetary relief awarded to the class exceeds $57 million. As Northwest recently advised this Court, the judgment in the instant case "may be the largest judgment ever rendered under the Equal Pay Act or Title VII of the Civil Rights Act."[2] And the injunctive relief awarded is equally sweeping, requiring substantial salary increases for thousands of female employees and elimination of sex discrimination in a wide range of employment practices.

To this day, the attorneys who have prosecuted this case on plaintiffs' behalf have received no compensation for their services, nor have they been reimbursed for their massive outlays to finance the prosecution of this case. Moreover, throughout the entirety of that fifteen-year period—and until this Court's denial of certiorari on the merits earlier this year—plaintiffs' counsel faced the risk that plaintiffs ultimately might not prevail in this action in whole or in substantial part, and that counsel in consequence would go entirely, or largely, without compensation for their services.

Following the district court's entry of final judgment on the merits in November, 1982, plaintiffs filed an application for attorneys' fees, seeking compensation for more than 11,000 attorney hours devoted to the litigation of the merits up to that point. Plaintiffs' entitlement to a fee award against Northwest pursuant to § 706(k)

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[2] Petition for Writ of Certiorari in No. 84-825, pp. 2-3.

of Title VII and § 16(b) of the Fair Labor Standards Act (which is applicable in Equal Pay Act cases) was not disputed. What was disputed was the *amount* of the award to which plaintiffs are entitled. The instant petition for certiorari arises out of the disposition below of that question.[3]

1. *The Lodestar.* While the *number* of hours for which compensation was due was not seriously disputed—the district court determined that 11,236 "merits hours" were compensable (App. 101a),[4] and Northwest did not challenge that determination on appeal—the *rates* to be used in constructing the lodestar were the subject of a fundamental debate. Plaintiffs contended that the lodestar rates for their attorneys (all in the firm of Bredhoff & Kaiser) should be determined by reference to the prevailing rates in the District of Columbia for lawyers of comparable skill, experience and reputation. Northwest, noting that Bredhoff & Kaiser has chosen to concentrate its practice on the representation of working people and non-profit clients who pay rates substantially below those prevailing in the District of Columbia, contended that the "market" rates for Bredhoff & Kaiser attorneys (and accordingly the rates that should be used in determining the lodestar in this case) should be determined by what the firm's fee-paying clients pay. The district court rejected Northwest's contention and agreed with plaintiffs that the lodestar rates should be determined by the prevailing market rates in the community received by lawyers of comparable skill, experience and reputation for performing work similar to the work for which the fee award was sought (App. 103a-109a).

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[3] Plaintiffs' counsel have devoted additional hours subsequent to November, 1982, defending the district court's final judgment on appeal and overseeing Northwest's compliance with that judgment. A separate application for compensation for those additional services will be filed in the district court.

[4] The court also awarded fees for time spent litigating the amount of the fee award (App. 101a).

The district court predicated its determination of the lodestar rates upon the following findings, none of which had been disputed by NWA and each of which was abundantly supported by the record:

> —Defendant does not dispute the high quality of legal services rendered in this case; indeed, it acknowledges counsels' "prominence and ability" and concedes that Bredhoff & Kaiser is "one of the 'premier' employment discrimination firms in the country" [App. 103a].
>
> —Defendant also does not challenge Plaintiffs' proposed matrix [of lodestar rates] as an accurate depiction of the prevailing market rates for lawyers of comparable skill and ability who represent defendants in complex Title VII cases [App. 103a].[5]
>
> —Finally, Defendant acknowledges that the rates Plaintiffs' counsel charge fee-paying clients are not a function of the intrinsic value of the firm's legal services but rather of the particular clients the firm chooses to represent and their ability to pay [App. 103a].

On the basis of these findings, the district court adopted the matrix of lodestar rates proposed by plaintiffs: $75 per hour for lawyers in their first through third years of practice; $100 for years 4-7; $125 for years 8-10; $150 for years 11-19; and $175 for the 20th year and beyond (App. 102a, 109a-110a).[6]

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[5] The court's opinion also stated:

> The Court finds that the relevant legal market in this action is complex employment discrimination litigation and that this market is subject to the same hourly rates that prevail in other complex federal litigation. [App. 108a; see also App. 109a].

[6] Because the suit spanned so long a period, the court fractionated the computation for each attorney, applying the matrix of rates to each year's service on the basis of the attorney's experience as of that year. For example, the rate for Michael Gottesman (plaintiffs' senior counsel) was $150 for hours prior to 1978 (his 20th year) and $175 thereafter. See App. 102a, n.31; 110a.

The court of appeals, in a divided opinion, ruled that the district court erred when it determined the lodestar rates by reference to prevailing rates in the community, and directed instead that the lodestar rates must be determined by reference to the rates charged by Bredhoff & Kaiser to its fee-paying clients (App. 18a-42a). In arriving at that result, the court below did not disturb any of the district court's findings. Nor did the court overlook this Court's holding in *Blum v. Stenson*, —— U.S. ——, 104 S. Ct. 1541 (1984), that the lodestar rates for salaried attorneys employed by non-profit organizations are to be determined by reference to prevailing rates in the community. Rather, the court below understood the holding in *Blum* to have resulted only "because the attorneys involved had no regular billing rates [so that] the court was required to set a hypothetical rate where none otherwise existed" (App. 26a). The court below concluded, however, that the approach to fee-setting adopted in *Blum*—which it variously characterized as "an essentially impossible task" (App. 28a), "a largely arbitrary divination" (App. 29a), "a charade" (App. at 30a), "[g]arbage in, garbage out" (App. 30a, n.99), and "whimsical and capricious" (App. 32a)—is not necessary in the case of attorneys who actually collect fees from some of their clients. And if those attorneys have elected a practice of representing less affluent fee-paying clients—and thereby have demonstrated their willingness to work at the rates those clients are able to pay—it would be a "windfall" to award them fees in a civil rights case at the same levels as would be awarded if the case had been handled by equally competent attorneys whose practice otherwise consisted of representing more affluent clients at higher rates (App. 22a-23a). The court stated that holding attorneys to their own rates spares the courts the burden of determining the prevailing rates in the community for lawyers of comparable skill, experience and reputation (App. 28a-40a)—a burden that must be "tolerated"

in the case of salaried attorneys only because it is "unavoidable" (App. 40a).

Judge Wright, dissenting, reasoned that the denial of prevailing rates to plaintiffs' counsel was inconsistent with this Court's holding in *Blum* and with the "unambiguous intent of Congress" as reflected in the legislative history recounted in *Blum* (App. 56a-65a).

2. *Quality Adjustment.* Plaintiffs had sought an upward adjustment in the lodestar to account for what they alleged was the exceptional quality of their representation. The district court denied such an adjustment for the following reason (App. 113a-114a):

> Plaintiffs' counsel . . . are extremely experienced, extraordinarily capable attorneys who provided Plaintiffs with legal representation of the highest caliber. For these reasons, Plaintiffs requested and have been awarded compensation at hourly rates commensurate with the most experienced, highly respected, and capable attorneys in the District of Columbia. And for *that* reason, no additional increase to compensate for the quality of counsels' performance is warranted.
>
> Plaintiffs' counsel clearly performed with distinction, but that is no more than the Court or Plaintiffs would demand of counsel earning up to $175 per hour. Counsels' legal acumen and impressive performance in this case . . . are fully accounted for in the lodestar rates. [Emphasis in original].

When Northwest appealed challenging, *inter alia*, the lodestar rates awarded, plaintiffs cross-appealed, contending that if the lodestar rates were reduced on appeal plaintiffs were entitled to a remand for reconsideration by the district court of the propriety of a quality adjustment in light of the lower lodestar rates. The court of appeals, although reducing the lodestar rates, denied the remand requested by plaintiffs. Its full explanation was as follows (App. 41a-42a, n.128):

> Laffey cross-appeals, seeking to have the issue of enhancement of the lodestar remanded if the hourly rates are reduced. In *Blum* the Supreme Court held that an upward adjustment for quality may be justified "only in the rare case where the fee applicant offers specific evidence to show that the quality of service rendered was superior to that one reasonably should expect in light of the hourly rates charged and that the success was 'exceptional.' " [104 S. Ct.] at 1549. In this case, there simply was no specific evidence that plaintiffs' counsel provided services that were "superior" to those services provided at the firm's normal rates. In addition, the trial judge expressly found that "[t]he case . . . simply was not 'exceptional' as that term has been defined by the Court of Appeals." *Laffey v. Northwest Airlines, Inc.*, 572 F. Supp. 354, 377 (D.D.C. 1983). Therefore, *the district judge has already found* that under the controlling law established by *Blum* plaintiffs' counsel do not qualify for a "quality" multiplier. [Emphasis in original].

3. *Contingency Adjustment.* Because the rates used in the lodestar are those charged by lawyers who are promised payment of their fees regardless of whether they prevail [7]—and because "[w]hen Plaintiffs' counsel agreed to undertake this lawsuit . . . they did so with the understanding that they would not be compensated for their labor unless they ultimately prevailed on the merits" (App. 117a)—plaintiffs contended that the lodestar alone (i.e., hours times lodestar rate) did not reflect what lawyers would have charged in the marketplace to undertake this litigation on a contingent basis, and thus did not constitute an appropriate fee award

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[7] This is true both of the matrix of prevailing community rates that the district court approved for the lodestar (App. 115a, n.43) and of Bredhoff & Kaiser's own rates to fee-paying clients that the court of appeals ordered be used in constructing the lodestar.

under the civil rights fee-shifting statutes. Plaintiffs accordingly sought an upward adjustment for contingency.

The district court awarded such an adjustment. The court began (App. 115a):

> Where a prevailing plaintiff's counsel litigates Title VII claims on the understanding that it will receive no significant remuneration unless the lawsuit is successful, an upward adjustment in the lodestar is appropriate "to compensate for the risk that the lawsuit would be unsuccessful and that no fee at all would be obtained" [quoting *Copeland v. Marshall*, 641 F.2d 880, 892 (D.C. Cir. 1980) (*en banc*)].

The court reasoned: "Lodestar adjustments are not 'bonuses' or 'rewards' in excess of an attorney's deserved compensation, but are an 'attempt to calculate more precisely the market value of the services provided by the attorney'" (App. 112a, quoting *Alabama Power Co. v. Gorsuch*, 672 F.2d 1, 6 n.28 (D.C. Cir. 1982)).

"[T]he lodestar calculation here does not account for the risk of not prevailing" (App. 115a, n.43). The district court accordingly turned to an assessment, viewed as of the outset of the litigation (App. 115a-116a) (when plaintiffs' counsel had to decide whether to undertake the litigation) of "the 'actual probability' that the fee applicant would have lost the case and recovered no fee" (App. 116a, quoting *Donnell v. United States*, 682 F.2d 240, 254 n.43 (D.C. Cir. 1982)). The court had before it extensive documentation by plaintiffs' counsel particularizing the nature of the risk they had assumed (App. 94a, 117a). The court concluded that "Plaintiffs' likelihood of success was approximately 50%" (App. 119a). That assessment was predicated upon the following findings:

> —[T]he alleged statutory violations touched virtually every aspect of Defendant's employment practices and raised a multitude of legal and factual issues; and the outcome of these issues was far from preordained [App. 117a].

> —No prior government or private proceeding had suggested Defendant's liability or had even developed the facts of the case; Plaintiffs' counsel had to conduct their own extensive investigation and discovery, and they simply could not know at the outset of their representation how the critical facts would develop [App. 117a, footnote omitted].
>
> —[T]he case was brought at an early stage in the development of the law under Title VII and the Equal Pay Act. There were few significant legal precedents interpreting either of the statutes and none from the United States Supreme Court. Thus, Plaintiffs' counsel could not know or reliably predict what the controlling standards would be [App. 118a, footnote omitted].
>
> —Finally, Plaintiffs knew they were facing a large, well-financed corporate defendant with a policy and history of tenaciously defending cases brought against it. This fact, combined with the unsettled state of the law, presaged a protracted battle in both the trial and appellate courts. And Plaintiffs' counsel knew at the outset that the battle would be waged on Defendant's behalf by extremely capable counsel. . . . [App. 118a].

On the basis of its finding that Plaintiffs' likelihood of success at the outset was approximately 50%, and "factor[ing] into the calculus the magnitude of the undertaking and, consequently, the number of hours counsel placed at risk" (App. 119a-120a),[8] the court concluded that "Plaintiffs are fully deserving of [a] 100% contingency adjustment" (App. 120a).

A divided court of appeals reversed, holding that "no risk enhancement should be awarded" in this case (App.

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[8] The court found:

> [Plaintiffs' counsel] had every reason to anticipate [at the time they undertook this case] that the case would require a substantial investment (both in time and out-of-pocket expenditures) over an extended period [App. 117a, footnote omitted].

51a). Expressing doubt whether contingency adjustments are *ever* appropriate in fee-shifting cases (App. 46a-47a, n.138, 49a, 50a), the court understood this Court to have held in *Blum v. Stenson*, *supra*, that at most they are allowable only in "exceptional" cases (App. 50a, see also App. 49a).[9] And, the court concluded, this is not such a case (App. 50a-51a):

> Whatever the Supreme Court meant by the term "exceptional," this case does not fall within its embrace. The district court found that the plaintiffs' initial chance of success was 50 percent. *That chance of winning reflects the norm for litigated cases*—in the average case, one side will win, one will lose. *The level of risk was not unusual.* Since this case did not present an exceptional level of risk, no risk enhancement should be awarded. [Emphasis in original; footnote omitted].

The court below also made clear that it would be improper to award a contingency adjustment in any case in which the risk of not prevailing *exceeded* 50%, for then "[t]he award would be greatest when the losing party was most unreasonable [sic] in litigating its case, creating a perverse penalty for those least culpable," and "the net effect . . . would be to make a marginal case as attractive to bring as a very strong case" (App. 45a, footnote omitted). The court did not indicate, in the light of these rulings, what type of case *could* qualify as an "exceptional" case permitting a contingency adjustment.

Judge Wright, in dissent, disagreed that this Court in *Blum* had decided *any* issue respecting contingency adjustments, let alone that they could be awarded only in

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[9] The court below expressed its view that contingency adjustments should *never* be awarded, because they in effect compensate attorneys for the time spent in other statutory fee cases in which they do not prevail, and thus contravene the principle established in *Hensley v. Eckerhart*, 461 U.S. 424, 434-35 (1983), that attorneys are not to be compensated in such cases for unsuccessful claims (App. 46a-47a).

exceptional cases (App. 70a), and believed that the district court's award of such an adjustment in this case should be affirmed (App. 69a). Noting that at least two of the decisions cited in the legislative history "as applying the appropriate standard" had "adjusted the award to account for the risks incurred by the attorney" (App. 71a, n.18), Judge Wright reasoned (App. 71a-72a):

> Congress made a deliberate judgment to encourage litigants to press claims for violation of civil rights even where the chances of success are uncertain. The legislative decision to permit courts to make adjustments to compensate for the risk of not prevailing reflects the "experience of the marketplace that lawyers generally will not provide legal representation unless they receive a premium for taking that risk." Berger, *Court Awarded Attorney Fees: What is Reasonable?*, 126 U. Pa. L. Rev. 281, 325 (1977). No doubt, Congress did not intend to encourage suits even where the prospects of success are extremely remote. But where, as here, the probabilities approached 50 percent, adjusting the lodestar to account for the prospect of large, uncompensated outlays of time and money is entirely consistent with —indeed, mandated by—the congressional design. [Footnotes omitted].

A timely petition for rehearing was denied by the panel (App. 74a), and a suggestion of rehearing *en banc* was denied with three judges indicating that they had voted for rehearing and two others not participating (App. 75a).

REASONS FOR GRANTING THE WRIT

The decision below poses three important and recurring issues respecting the standards for awards of attorneys' fees in federal civil rights cases. Each issue merits plenary consideration by the Court.

First, the court of appeals ruled that this Court's holding in *Blum*—that salaried lawyers employed by nonprofit

organizations are entitled to fee awards in civil rights cases based on the prevailing market rates in the community for lawyers of comparable skill, experience and reputation—does not apply to lawyers in private practice whose rates to fee-paying clients in other cases are, because of the nature of the lawyers' chosen clientele, lower than the prevailing market rates for lawyers of comparable skill, experience, and reputation. That ruling is inconsistent with the statutory interpretation announced in *Blum*, with the applicable legislative history, and with the decisions of other Circuits.

Second, the court of appeals held that a district court may not award an upward adjustment in the lodestar rates based on quality to lawyers who are found to have performed at a level superior to that expected of lawyers who charge at the level of the lodestar rates. That ruling is inconsistent with the standards for quality adjustments set forth in *Blum*.

Third, the court below held that plaintiffs' lawyers in a civil rights class action, who have devoted thousands of hours to a case with a 50% risk that the plaintiffs would not prevail and thus that the lawyers would go uncompensated, cannot be awarded an upward adjustment of the lodestar rates based on risk, even though the lodestar rates have been determined by reference to hourly rates for non-contingent work. That ruling addresses a question expressly left open in *Blum*, is inconsistent with the applicable legislative history, and is in conflict with the decisions of ten Circuits. (One other Circuit has reached the same result as the court below on this issue.)

This case has been closely watched by practitioners with an interest in civil rights litigation. Under the standards set down by the court below, it would be economically irrational for lawyers to take on the representation of plaintiffs in large civil rights class actions—a result directly contrary to Congress' objective in providing for awards of attorneys' fees in such cases. A decision of that consequence should not go unreviewed.

1. *The Lodestar Rates.* The court of appeals ruled that the district court erred in determining the lodestar rates for plaintiffs' attorneys by reference to the prevailing rates in the community for lawyers of comparable skill, experience and reputation, and instead was required to look to the rates charged by plaintiffs' attorneys to other clients, even though those rates were found to reflect the nature of the clientele and not the market value of the attorneys' services. That ruling is inconsistent with the rationale of this Court's decision in *Blum v. Stenson*, —— U.S. ——, 104 S. Ct. 1541 (1984), and with the legislative history on which the decision in *Blum* was premised. Moreover, the ruling directly conflicts with two decisions of the Ninth Circuit, and also conflicts with general principles announced in decisions in a number of other Circuits.

In *Blum*, this Court ruled that Congress intended the lodestar rates in civil rights fee awards to non-profit legal services organizations to be calculated according to the prevailing market rates "in the community for similar services by lawyers of reasonably comparable skill, experience and reputation" (104 S. Ct. at 1547 n.11)—precisely the standard for determining the lodestar rates employed by the district court in the instant case. The court of appeals attempted to confine the reach of *Blum* to cases where the fee applicants are salaried employees of non-profit organizations, stating that in such cases an inquiry into prevailing market rates is required because the lawyers involved have no established billing rate. In other cases, according to the court of appeals, a lawyer's billing rates, rather than the prevailing market rates, should control, even where, as here, it is established that the lawyer's billing rates do not reflect the market value of his services.[10]

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[10] It is, of course, true that in many cases—perhaps most—the billing rates of a private, for-profit lawyer are an accurate reflection of, indeed are a direct function of, the prevailing market value of that lawyer's services. In such cases, a lawyer's own billing rates should be congruent with the prevailing rates in the community

The court of appeals' attempted limitation of *Blum* cannot be reconciled with either the language or the rationale of *Blum*. Thus, the *Blum* Court concluded:

> It is . . . clear from the legislative history that Congress did not intend the calculation of fee awards to vary depending on whether plaintiff was represented by private counsel or by a nonprofit legal services organization.
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> The statute and legislative history establish that "reasonable fees" . . . are to the calculated according to the prevailing market rates in the relevant community, regardless of whether plaintiff is represented by private or nonprofit counsel. [104 S. Ct. at 1547; footnote omitted].

See also *id.* at 1550 n.18 ("we decline[] to draw a distinction with respect to the use of market rates between profit and nonprofit law offices"). And, the Court predicated those conclusions on an analysis of legislative history making clear that Congress intended a single standard—the prevailing rate in the community for lawyers of comparable skill, experience and reputation—to govern the calculation of fee awards in civil rights cases regardless of the fee applicants' type of practice. *Id.* at 1547-48.

Moreover, the very reasons offered by the court of appeals for applying a different standard in the instant case were explicitly rejected by the Court in *Blum*. The court of appeals suggested that use of the prevailing community rates standard here would result in rates exceeding

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and accordingly should be highly informative of his lodestar rates. But where, as has been found as fact here, a lawyer's established billing rates are a function of such non-economic factors as the choice to represent a particular clientele that cannot afford to pay prevailing market rates, that lawyer's billing rates do not reflect the value of his services on the open market. In such cases, a lawyer's own billing rates no more reflect the prevailing market rate in the community than do the salaries of lawyers employed by non-profit legal service organizations.

the amount necessary to induce these particular attorneys to undertake civil rights cases, would confer a "windfall" upon the fee applicants, and would be difficult to calculate. The Court in *Blum* addressed and rejected each of these asserted reasons not to apply the prevailing market rate standard. The Court in *Blum* affirmed an award based on "prevailing market rates" to salaried employees of a non-profit organization, despite the argument of the defendant and the Solicitor General that such rates were "unnecessary to attract non-profit counsel" and would "confer an unjustified windfall." 104 S. Ct. at 1546. The *Blum* Court explained that the legislative history unmistakably established that Congress intended fee awards to *all* lawyers to be "calculated according to prevailing market rates," and that rates computed in that manner are not a "windfall." *Id.* at 1546-47. While such rates may be "unnecessary" to attract lawyers whose career choices demonstrate a willingness to work for less, that "policy argument" cannot justify departing from the choice Congress made. *Id.* Finally, the Court in *Blum* "recognize[d] . . . that determining an appropriate 'market rate' for the services of a lawyer is inherently difficult." *Id.* at 1547, n.11. "Nevertheless," the Court concluded, that is "the critical inquiry in determining reasonableness." *Id.*

The services that a lawyer representing plaintiffs in a civil rights action is called upon to perform are the same whether that lawyer is otherwise a corporate lawyer, a tax lawyer, a union lawyer, or a civil rights lawyer. But, under the court of appeals' approach, the fee award in such a case becomes a function not of the lawyer's skill, experience, and reputation, but of the type of practice he has chosen to follow or of the type of clients he has chosen to represent in cases *other* than the one before the court. For example, suppose a given lawyer who is highly skilled and experienced chooses at one point in his career between three separate opportunities then available to him. The first is at a for-profit corporate

law firm; the second is at a for-profit firm that represents indigent clients at reduced rates; and the third is at a non-profit organization that would employ him on a salaried basis. According to the court of appeals, should that lawyer subsequently represent the prevailing party in a civil rights case his fee award would depend on which job he had chosen: as a corporate lawyer, he would be entitled to a lodestar rate based on his normal billing rate which should in fact accurately reflect the market value of his services (see note 10, *supra*); as a salaried lawyer, he would be entitled to the same lodestar rate he would have received as a corporate lawyer, because that rate would accurately reflect the value on the open market of the services of a lawyer of his skill, experience and reputation; but as a for-profit lawyer representing indigent clients, he would be entitled only to a lodestar rate at the lower level his indigent clients were able to pay. Though the market value of his services in the civil rights case, based on skill, experience and reputation would be the same no matter which career path he had chosen, it would, according to the court of appeals, be a "windfall" to award him that market value if he chose as his general career a private practice representing indigent clients. It is unlikely that the Congress that enacted the various civil rights statutes intended such a result.[11]

The court of appeals' ruling on this issue is in direct conflict with two decisions of the Ninth Circuit: *Manhart v. City of Los Angeles Dept. of Water*, 652 F.2d 904, 909

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[11] As the dissent in the court below pointed out, the instant case exemplifies the anomaly of the holding below:

> In *Blum v. Stenson*, 104 S. Ct. 1541, 1544 n.4 (1984), the Supreme Court upheld a reasonable hourly rate of $105 per hour to a Legal Aid lawyer with one and a half years of litigating experience. This amount appears to exceed the average fee for Bredhoff & Kaiser *partners* with vastly more extensive experience. . . . Congress did not intend such an incongruous result. [App. 59a, n.4; emphasis in original].

(9th Cir. 1981), *vacated and remanded on other grounds*, 461 U.S. 951 (1983) (private attorneys representing labor unions entitled to fees based on prevailing market rates, not on the rate charged the union); and *White v. City of Richmond*, 713 F.2d 458, 461 (9th Cir. 1983) (private, for-profit attorneys not required to submit evidence of their "customary hourly rate" because "many civil rights practitioners do not bill their clients at an hourly commercial rate"). See also, *Strama v. Peterson*, 561 F. Supp. 997, 998-99 (N.D. Ill. 1983). The Court's ruling also conflicts with general principles announced in decisions of a number of other Circuits. See, *e.g.*, *Ramos v. Lamm*, 713 F.2d 546, 555 (10th Cir. 1983) ("If the lawyer seeking the fee is in private practice, his or her customary rate would be a relevant but not conclusive factor"); *Henry v. Webermeier*, 738 F.2d 188, 193 (7th Cir. 1984); *Neely v. City of Grenada*, 624 F.2d 547, 549-551 (5th Cir. 1980).

2. *Quality Adjustment.* In *Blum*, this Court stated the following standard for determining whether "quality of representation" may justify an upward adjustment in the lodestar rates:

> The "quality of representation" . . . generally is reflected in the reasonable hourly rate. It, therefore, may justify an upward adjustment only in the rare case where the fee applicant offers specific evidence to show that the quality of service rendered was superior to that one reasonably should expect in light of the hourly rates charged and that the success was "exceptional." [104 S. Ct. at 1549].

The district court denied a quality adjustment, even though it had found that "[p]laintiffs' counsel . . . are extremely experienced, extraordinarily capable attorneys who provided Plaintiffs with legal representation of the highest caliber," precisely because it had "awarded [plaintiffs' counsel] compensation at hourly rates commensurate with the most experienced, highly respected, and capable attorneys in the District of Columbia" (App.

113a-114a). "[F]or *that* reason, no additional increase to compensate for the quality of counsels' performance is warranted" (App. 114a, emphasis in original). As has already been discussed, the court of appeals rejected the lodestar rates adopted by the district court and ruled that the lodestar must be based upon the lower rates customarily charged by plaintiffs' counsel to their fee-paying clients.

Given the findings of the district court respecting the quality of plaintiffs' counsel's performance, the court of appeals' ruling on the lodestar rates leaves precisely the situation in which the *Blum* Court stated a quality adjustment may be appropriate: "the quality of service rendered was superior to that one reasonably should expect in light of the hourly rates charged and . . . the success was 'exceptional'." [12] The court of appeals' rejection of plaintiffs' cross-appeal on this point—on the ground that "there simply was no specific evidence that plaintiffs' counsel provided services that were 'superior' to those services provided at the firm's normal rates" (App. 42a, n.128)—conflicts with the standard set forth in *Blum*.[13]

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[12] *Blum* stated that quality adjustments will be appropriate "only in the rare case." 104 S. Ct. at 1549. That is because, as we have shown in part 1, *Blum* held that the *lodestar rate* is to be set at a level that reflects the skill, experience and reputation of the attorney. On that assumption as to the lodestar rate, a quality adjustment would be warranted only in the rare case in which an attorney's performance was so exceptional that it *exceeded* what is to be expected of an attorney of his own skill, experience and reputation. But if the court below is right that some attorneys are to receive lodestar rates *below* those reflecting their skill, experience and reputation because of the nature of their clientele, the teaching of *Blum* is that such attorneys are eligible for a quality adjustment.

[13] As discussed in text, the district court found that a quality multiplier would not be appropriate given the lodestar rates *it* awarded. Having rejected those lodestar rates in favor of lower rates, the court of appeals' statement that the district court has already ruled on this issue (App. 42a, n.128) is disingenuous.

And the statement of the court below that this is not a case in which the success was exceptional likewise is not faithful to this Court's holding in *Blum*, given the results obtained in this case (*supra*, p. 4).[14]

3. *Contingency Adjustment.* Plaintiffs' counsel invested massive time and resources in this case, knowing that there was a 50% chance that the plaintiffs would not ultimately prevail and that in that event plaintiffs' counsel would go wholly uncompensated. The lodestar rates mandated by the court of appeals—as well as the lodestar rates adopted by the district court—are based on rates for non-contingent cases and do not account at all for the risk of non-success inherent in this contingent fee context. The court of appeals ruled, nonetheless, that in these circumstances the district court was without discretion to award any upward adjustment in the lodestar rates to account for the risk undertaken by plaintiffs' counsel.[15]

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[14] The court below purported merely to be accepting the district court's determination that this "case" was not "exceptional" (App. 42a, n.128). But what the district court had said was that the results were not exceptional given the "caliber of representation" expected from those commanding the lodestar rates the district court had awarded (App. 114a-115a). The district court nowhere intimated that it would have thought the results not "exceptional" given the "caliber of representation" that would be expected from lawyers commanding the lower lodestar rates mandated by the court of appeals.

[15] In so ruling, the court of appeals effectively held that a risk adjustment is never appropriate. While the court stated that in some "exceptional" cases an adjustment for risk might be appropriate (App. 50a), the court's analysis leaves no room for such a case. The court ruled that a 50% chance of success is not "exceptional" (App. 50a-51a), and that a smaller chance of success should not be rewarded (App. 45a-46a); and, *a fortiori*, because a better than 50% chance is even less risky than a 50% chance, that situation too would not qualify. Moreover, given its denial of an adjustment on the facts of this case, the court necessarily rejected "the magnitude of what was placed at risk" (App. 48a) as a factor justifying a risk adjustment.

This Court in *Blum* expressly left open the question whether an upward adjustment for risk may be awarded under the attorneys' fees provisions of the federal civil rights statutes:

> We have no occasion in this case to consider whether the risk of not being the prevailing party in a § 1983 case, and therefore not being entitled to an award of attorney's fees from one's adversary, may ever justify an upward fee adjustment. [104 S. Ct. at 1550, n.17].

Four members of this Court have stated a view on this issue that is inconsistent with the decision of the court below. In *Hensley v. Eckerhart*, 461 U.S. 424, 448-49 (1983), Justice Brennan, concurring in part and dissenting in part, joined by Justices Marshall, Blackmun and Stevens, wrote as follows:

> [O]n many occasions awarding counsel fees that reflect the full market value of their time will require paying more than their customary hourly rates. Most attorneys paid an hourly rate expect to be paid promptly and without regard to success or failure. Customary rates reflect those expectations. Attorneys who take cases on contingency, thus deferring payment of their fees until the case has ended and taking upon themselves the risk that they will receive no payment at all, generally receive far more in winning cases than they would if they charged an hourly rate. The difference, however, reflects the time-value of money and the risk of nonrecovery usually borne by clients in cases where lawyers are paid an hourly rate. Courts applying § 1988 must also take account of the time-value of money and the fact that attorneys can never be 100% certain they will win even the best case.
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> Therefore, district courts should not end their fee inquiries when they have multiplied a customary hourly rate times the reasonable number of hours expended, and then checked the product against the

> results obtained. They should also consider both delays in payment and the pre-litigation likelihood that the claims which did in fact prevail would prevail. . . . These factors are potentially relevant in every case. . . . [N]o fee is reasonable unless it would be adequate to induce other attorneys to represent similarly situated clients seeking relief comparable to that obtained in the case at hand.

See also *Blum*, 104 S. Ct. at 1550 (Justice Brennan, joined by Justice Marshall, concurring).

The Circuits are in conflict on this issue. Ten Circuits have adopted the view stated in Justice Brennan's opinion in *Hensley*.[16] And, the Seventh Circuit has joined the court below in the contrary position.[17]

The legislative history expressly contemplates that the contingent nature of an attorney's compensation should be a factor in determining the amount of fee awards in

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[16] Post-*Blum*: *Hall v. Borough of Roselle*, 747 F.2d 838, 842-43 (3rd Cir. 1984); *Institutional Juveniles v. Secretary of Public Welfare*, —— F.2d ——, Nos. 83-1696 & 83-1722 (3rd Cir. 1985); *Craik v. Minnesota State University Board*, 738 F.2d 348, 350-51 (8th Cir. 1984); *Jones v. Central Soya Co., Inc.*, 748 F.2d 586, 591-93 (11th Cir. 1984).

Pre-*Blum*: *Yates v. Mobile County Personnel Board*, 719 F.2d 1530, 1533-34 (11th Cir. 1983); *Carmichael v. Birmingham Saw Works*, 738 F.2d 1126, 1138 (11th Cir. 1984); *Graves v. Barnes*, 700 F.2d 220, 222, 224 (5th Cir. 1983); *Louisville Black Police Off. v. City of Louisville*, 700 F.2d 268, 279-81 (6th Cir. 1983); *Maceira v. Pagan*, 698 F.2d 38, 41 (1st Cir. 1983); *Stanford Daily v. Zurcher*, 550 F.2d 464 (9th Cir. 1977) (*affirming* 64 F.R.D. 680, 685-86 (N.D. Cal. 1974)), *rev'd on other grounds*, 436 U.S. 547 (1978); *White v. City of Richmond*, 713 F.2d 458, 462 (9th Cir. 1983); *Cooper v. Singer*, 719 F.2d 1496, 1500, 1501 n.8 (10th Cir. 1983); *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 471 (2nd Cir. 1974); *Cohen v. West Haven Bd. of Police Com'rs*, 638 F.2d 496, 505 (2nd Cir. 1980); *Anderson v. Morris*, 658 F.2d 246, 248-49 (4th Cir. 1981).

[17] *McKinnon v. City of Berwyn*, 750 F.2d 1383, 1392 (7th Cir. 1984).

civil rights cases. Thus, as the Court in *Hensley* recognized, the factors for setting fee awards, which were identified in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974), and adopted by Congress, include "whether the fee is fixed or contingent." 461 U.S. at 429-430 & n.3; see also *id.* at 434 n.9. And, the decisions referred to in the congressional reports as "correctly appl[ying]" (461 U.S. at 430) the *Johnson* factors include *Stanford Daily v. Zurcher*, 64 F.R.D. 680 (N.D. Cal. 1974) (*subsequently aff'd*, 550 F.2d 464 (9th Cir. 1977), *rev'd on other gronds*, 436 U.S. 547 (1978)). The decision in *Stanford Daily*, to which Congress pointed, stated:

> Federal court decisions generally reason that the amount of any award of attorneys' fees should reflect any contingencies which stood between the attorneys and their deserved fee. . . . These decisions parallel the American Bar Association's determination that attorneys deserve higher compensation for contingent than for fixed-fee work. *Cf.* Canon 2 of the Code of Professional Responsibility of the American Bar Association, Disciplinary Rule 2-106(b)-(8) (1969).
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> Clearly, this court must increase the fees award obtained by multiplying the number of work hours by the average billing rate to reflect the fact that the attorneys' compensation . . . was contingent in nature. [64 F.R.D. at 685-86]

Under the contrary ruling of the court below, a lawyer undertaking a plaintiff's civil rights case is on notice that if the plaintiff loses he will collect no fee, and if the plaintiff prevails he can receive only the fee he normally charges in non-contingent cases. If the decision below is left undisturbed, cases the magnitude of this one simply will not be brought for want of qualified attorneys willing to undertake the enormous risk of non-compensation. What lawyers in the future would be

willing to devote so much of their professional careers to a massive class action like *Laffey*, knowing that if they lose they will collect nothing and that if they achieve virtually total success they will receive only what could have been collected *without risk* from regular fee-paying clients?

The words of the Eleventh Circuit in *Yates*, 719 F.2d at 1534, are pertinent here:

> Vindication of the policy of the law depends to a significant degree on the willingness of highly skilled attorneys, such as those now before the court, to accept employment in discrimination cases on a wholly contingent basis. They will hardly be willing to do so if their potential compensation is limited to the hourly rate to which they would be entitled in non-contingent employment. Busy and successful attorneys simply could not afford to accept contingent employment if those were the rules that were applied. The enforcement of our civil rights acts would then be entrusted largely to less capable and less successful lawyers who lack sufficient employment. Such an arrangement would ill serve policies of enormous national importance.

The availability of contingency adjustments thus is critical to the enforcement of the federal civil rights laws. The issue is open in this Court, and has been resolved in a conflicting manner by the Circuits. This case presents an appropriate occasion for this Court definitively to resolve the question. The Court should do so.

CONCLUSION

The Court should grant this petition for a writ of certiorari to review the opinion and judgment of the District of Columbia Circuit in this case.

Respectfully submitted,

DANIEL A. REZNECK
TIMOTHY J. LINDON
ARNOLD & PORTER
1200 New Hampshire Ave., N.W.
Washington, D.C. 20036
(202) 872-6700

MICHAEL H. GOTTESMAN
(Counsel of Record)
ROBERT M. WEINBERG
JULIA PENNY CLARK
BREDHOFF & KAISER
1000 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 833-9340
Counsel for Petitioners